STATE OF MICHIGAN

IN THE SUPREME COURT
FROM THE MICHIGAN COURT OF APPEALS

MICHAEL LIND,

Plaintiff-Appellant,

-v-

CITY OF BATTLE CREEK,

Defendant-Appellee.
_____/

Supreme Court No: 122054
Ct. of Appeals No: 227874
Calhoun Co. Cir Ct: 98-005111-CL

Marshall W. Grate (P37728)
ROBERTS, BETZ & BLOSS
Attys. for Plaintiff-Appellant
5005 Cascade Road, S.E.
Grand Rapids, MI 49546
(616) 285-8899
_____/

Clyde J. Robinson (P30389)
DEPUTY CITY ATTORNEY
Atty. for Defendant-Appellee
P.O. Box 1717
Battle Creek, MI 49016
(269) 966-3835

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Marshall W. Grate
ROBERTS, BETZ & BLOSS
Attys. for Plaintiff-Appellant

BUSINESS ADDRESS:

5005 Cascade Road, S.E.
Grand Rapids, MI 49546
(616) 285-8899

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

U.S. Supreme Court Cases

Federal Cases

Michigan Cases

Constitutional Provisions

Statutes

Other Authorities

STATEMENT OF THE BASIS OF JURISDICTION

The Michigan Supreme Court's jurisdiction in this case is premised on MCR 7.302. This appeal arises out of a decision by the Michigan Court of Appeals which affirmed an award of summary disposition by the trial court which dismissed the Appellant's claim for race discrimination under Michigan's Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.550(2101) *et seq.* On March 10, 2000, the trial court issued a written opinion awarding the Defendant-Appellee summary disposition. The trial court issued a final order in the case on May 28, 2000, which denied Appellant's Motion for Reconsideration. On June 8, 2000, the Appellant, Michael Lind, filed his Claim of Appeal by right in the Michigan Court of Appeals. On July 9, 2002, the Michigan Court of Appeals affirmed the trial court's award of summary disposition. On July 26, 2002, Michael Lind filed an Application for Leave to Appeal in the Michigan Supreme Court. On March 25, 2003, the Michigan Supreme Court granted Michael Lind's Application for Leave to Appeal and instructed the parties to brief whether or not the "background circumstances" standard adopted in *Allen v Comprehensive Health Services*, 222 Mich App 426; 564 NW2d 914 (1997), is consistent with Michigan's Civil Rights Act, and if so, whether it is also consistent with the Equal Protection Clause of the Michigan Constitution, Const 1963, art 1, § 2 and the Equal Protection Clause of the Federal Constitution, US Const, Am XIV.

STATEMENT OF THE QUESTIONS INVOLVED

I. **WHETHER THE "BACKGROUND CIRCUMSTANCES" STANDARD FOR REVERSE DISCRIMINATION CASES VIOLATES THE MICHIGAN CIVIL RIGHTS ACT, MCL 37.2101 *et seq.*; MSA 3.550(2101) *et seq.*?**

IN LIGHT OF *VENABLE v GENERAL MOTORS CORP*, 253 MICH APP 473; 656 NW2d 188 (2002), THE COURT OF APPEALS, PRESUMABLY, WOULD ANSWER THIS QUESTION: **YES**

THE TRIAL COURT WOULD ANSWER THIS QUESTION: **NO**

THE DEFENDANT-APPELLEE WOULD ANSWER THIS QUESTION: **NO**

THE PLAINTIFF-APPELLANT ANSWERS THIS QUESTION: **YES**

II. **ASSUMING, FOR THE SAKE OF ARGUMENT, THAT THE "BACKGROUND CIRCUMSTANCES" STANDARD IS CONSISTENT WITH THE MICHIGAN CIVIL RIGHTS ACT, DOES IT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION, AMENDMENT XIV?**

IN LIGHT OF *VENABLE v GENERAL MOTORS CORP*, 253 MICH APP 473; 656 NW2d 188 (2002), THE COURT OF APPEALS WOULD, PRESUMABLY, ANSWER THIS QUESTION: **YES**

THE TRIAL COURT, PRESUMABLY, WOULD ANSWER THIS QUESTION: **NO**

THE DEFENDANT-APPELLEE ANSWERS THIS QUESTION: **NO**

THE PLAINTIFF-APPELLANT ANSWERS THIS QUESTION: **YES**

III. **ASSUMING THAT THE "BACKGROUND CIRCUMSTANCES" STANDARD IS CONSISTENT WITH THE MICHIGAN CIVIL RIGHTS ACT, MCL 37.2101 AND CONSISTENT WITH THE FEDERAL CONSTITUTION, DOES IT VIOLATE MICHIGAN'S STATE CONSTITUTION, CONST 1963, ART 1, § 2?**

IN LIGHT OF *VENABLE v GENERAL MOTORS CORP*, 253 MICH APP 473; 656 NW2d 188 (2002), THE COURT OF APPEALS WOULD, PRESUMABLY, ANSWER THIS QUESTION: **YES**

THE TRIAL COURT WOULD ANSWER THIS QUESTION: **NO**

THE DEFENDANT-APPELLEE ANSWERS THIS QUESTION: **NO**

THE PLAINTIFF-APPELLANT ANSWERS THIS QUESTION: **YES**

IV. **ASSUMING THE "BACKGROUND CIRCUMSTANCES" STANDARD IS VALID, WHETHER THE COURT OF APPEALS' DECISION IS CLEARLY ERRONEOUS IN THAT IT VIOLATED THE *DE NOVO* APPELLATE STANDARD OF REVIEW FOR ESTABLISHING A *PRIMA FACIE* CASE FOR REVERSE DISCRIMINATION UNDER THE MICHIGAN'S CIVIL RIGHTS ACT?**

THE COURT OF APPEALS WOULD ANSWER THIS QUESTION: **NO**

THE TRIAL COURT WOULD ANSWER THIS QUESTION: **NO**

THE DEFENDANT-APPELLEE WOULD ANSWER THIS QUESTION: **NO**

THE PLAINTIFF-APPELLANT ANSWERS THIS QUESTION: **YES**

V. **WHETHER THE COURT OF APPEALS' DECISION THAT THE APPELLANT FAILED TO STATE A CLAIM FOR RELIEF BECAUSE OTHER WHITE EMPLOYEES WERE PROMOTED FROM A PROMOTION LIST IS CLEARLY ERRONEOUS AND CONFICTS WITH THE MICHIGAN COURT OF APPEALS CASE OF *LAITINEN v CITY OF SAGINAW,* 213 MICH APP 130; 539 NW2d 515 (1995)?**

THE COURT OF APPEALS WOULD ANSWER THIS QUESTION: **NO**

THE TRIAL COURT WOULD ANSWER THIS QUESTION: **NO**

THE DEFENDANT-APPELLEE WOULD ANSWER THIS QUESTION: **NO**

THE PLAINTIFF-APPELLANT ANSWERS THIS QUESTION: **YES**

VI. **WHETHER THE COURT OF APPEALS' DECISION IS CLEARLY ERRONEOUS IN FINDING NO QUESTIONS OF FACT OVER THE APPELLEE'S LEGITIMATE NONDISCRIMINATORY REASON(S)?**

THE COURT OF APPEALS WOULD ANSWER THIS QUESTION: **NO**

THE TRIAL COURT WOULD ANSWER THIS QUESTION: **NO**

THE DEFENDANT-APPELLEE WOULD ANSWER THIS QUESTION: **NO**

THE PLAINTIFF-APPELLANT ANSWERS THIS QUESTION: **YES**

STATEMENT OF MATERIAL PROCEEDINGS & FACTS

A. INTRODUCTION

The Michigan Civil Rights Act, MCL 37.2101; MSA 3.550(2101), prohibits employment discrimination on the basis of race. This is a simple proposition. Yet, this proposition enshrines one of the most noble of principles of America's jurisprudence. In *Brown v Board of Education*, 347 US 43 (1954), the United States Solicitor General made the following observation in his amicus brief:

> [Racial] Discrimination imposed by law, or having the sanction or support of government, inevitably tends to undermine the foundation of a society dedicated to freedom, justice and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law - an indispensable condition to a free society - under which all men stand equal and alike in the rights and opportunities secured to them by their government.[1]

The Michigan Civil Rights Act embodies this implied rule of law. Prohibition of discrimination on the basis of race should reign supreme in our jurisprudence, should withstand all challenge and should suffer no compromise. This appeal provides the Supreme Court with an opportunity to remove a blemish from this noble principle and to rededicate Michigan's jurisprudence to the proposition that all citizens, regardless of race, stand equal in the rights secured to them by their government.

This appeal involves a case of reverse discrimination. The Defendant/Appellee, City of Battle Creek Police Department ("City"), promoted a person of a different race to a supervisory police officer position over the Plaintiff/Appellant, Michael Lind, who had a college education; had past supervisory experience in a police department; had numerous commendations; had

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[1] Brief Amicus Curiae of the United States (1952) filed in *Brown v Board of Education*, 347 US 43 (1954), quoted in 49 Landmark Briefs and Arguments to the Supreme Court 118 (*Phillip v Kurland & Gerhard Casper eds.* 1975).

scored higher on the examination for the promotion; and while working full-time as a police officer, attended and completed law school.

Michael Lind's credentials contrasted sharply with those of the candidate the City promoted. The person promoted had no college education; had no supervisory experience; had a sparse record of commendations; had to take remedial English in order to pass his probationary period as a police officer; scored lower on the promotion examination; and failed a subsequent examination for promotion.

Michael Lind offered substantial evidence that the City's purported legitimate, nondiscriminatory reason for denying him this promotional opportunity was actually illegitimate and a pretext. Yet, despite this showing, the trial court granted summary disposition precluding Michael Lind's chance for his day in court. The Court of Appeals incorrectly affirmed this decision because this case involved reverse discrimination. The trial court and Court of Appeals imposed a higher standard of proof for reverse discrimination victims, a standard which clashes with the notion that the state's laws should, in fact, afford equal justice and equal access to all residents and citizens, regardless of their race.

B. STATEMENT OF FACTS

1. Plaintiff/Appellant's Qualifications

Michael Lind began his career in law enforcement in 1976 as a patrol officer with Pennfield Township Police Department. In 1979, the Township promoted him to Sergeant. In 1982, it made him Lieutenant, which was the second highest position in the Township Police Department, next to the Police Chief. As second-in-command, he was in charge of supervising 9-12 officers, training new officers, assisting in writing and executing policies, and the Pennfield Township Police Chief consulted with him on disciplinary matters. (38-40a).

In June, 1986, Michael Lind left the Pennfield Township Police Department to become a Patrol Officer in the city of Battle Creek's Police Department. He joined the City's Police Department because he thought there would be more opportunities and better wages, even at the Patrol Officer level. (40a). As a City police officer, Lind became a member of the Police Officers Labor Council (hereinafter, "POLC"), a union which represented police officers for the purpose of collective bargaining.

Michael Lind compiled an outstanding record at the City's Police Department. Prior to the filing of the lawsuit, Lind received at least 17 Unit Citations for excellent police work which are awarded to two or more police officers in recognition of extraordinary service. During the same time period, the City's Police Department awarded Michael Lind special recognition on seven different occasions for his excellent police work. These awards included:

1. On May 4, 1987, Police Chief Thomas Pope awarded Michael Lind a certificate of commendation; (46a).

2. On August 19, 1987, Police Chief Thomas Pope awarded Michael Lind a second professional excellence citation; (47a).

3. On December 28, 1992, Police Chief Thomas Pope issued a third professional excellence citation concerning Michael Lind's action in a robbery; (48a).

4. On November 1, 1993, Police Chief Thomas Pope, issued a fourth professional excellence citation for Michael Lind's response to a burglary complaint; (50a).

5. On December 6, 1993, Police Chief Thomas Pope recognized Michael Lind as officer of the month for December 1993; (49a).

6. On July 1, 1995, Police Chief Thomas Pope issued a certificate of commendation to Michael Lind in recognition of his providing police services to Bedford Charter Township; (51a).

7. On April 4, 1995, Deputy Chief of Police Jeffrey Kruithoff, on behalf of Police Chief Thomas Pope issued a commendation to Michael Lind for his work in connection with a drug investigation case. Assistant Prosecuting Attorney Matthew L. Glasier wrote a letter praising Michael Lind's police work. (52a).

The City consistently rated Michael Lind's work performance as acceptable to superior. (89-94a).

In addition to completing his bachelor's degree at Western Michigan University in Criminal Justice and obtaining his law degree, Michael Lind took advantage of every opportunity to improve his skills and knowledge of law enforcement through participating in numerous special seminars and training programs. (71-86a). For several years, he served as a field training officer responsible for training new recruits in police work, including the use of firearms and deadly force.[2]

2. Department Promotion Procedures

Michael Lind tried to advance himself in the City's Police Department. In 1994, he took and successfully passed the examination to become a candidate for a sergeant position, which is the police department's front line supervisory position. The promotion process for the sergeant and detective positions is contained in Section 6.9 of the Collective Bargaining Agreement. Candidates must first take and pass a written examination with a minimum score of 70%. Those candidates who pass the written examination take a second oral examination. A final score is assigned to the candidate based on the combined scores of the written test, the oral test and the candidate's seniority. A list is then posted of the eligible candidates from the highest ranking score to the lowest ranking score. If vacancies occur in sergeant positions, then the City may select any candidate within the top five of the list. As one candidate is selected, then the sixth candidate moves into the compliment of five. (99-100a).

[2] During the pendency of this lawsuit, Michael Lind attended law school at night and obtained his law degree. Because of his frustration with the promotion procedures, Michael Lind left the City's police force and now works as an assistant prosecuting attorney for Calhoun County, State of Michigan.

While the City may have discretion to select among the top five on the list, in actual practice, the City promoted in rank order down the list. David Adams, the POLC President, averred in his Affidavit that the City promoted in rank order down the list. (138a). Thus, in connection with Michael Lind's list, the first five individuals, from Jackie Hampton to Gary Mehl, were promoted in the order they appeared on the list from the highest to the lowest score. (133-135a).

During the relevant time period, the Police Chief was Thomas Pope, and the Deputy Police Chief was Jeffrey Kruithoff. Although Chief Pope made the final decision on promotions, he would usually consult with Deputy Police Chief Jeffrey Kruithoff. In fact, Chief Pope testified that he did consult with the Deputy Police Chief on the promotion in question:

Q At the time that Mr. McClenney's was promoted, this would have been April of 1996; correct?

A Yes.

Q Would you have been consulted with the Deputy Chief about this promotion?

A I believe I would have, yes. (150a).

In reality, Deputy Police Chief Jeffrey Kruithoff handled the day-to-day operations of the Police Department. When members of the Police Officers Labor Counsel's Executive Committee had personnel issues, they dealt directly with Deputy Chief Kruithoff. POLC president, David Adams and POLC Secretary, Gregory Huggett submitted affidavits averring that Deputy Chief Kruithoff was responsible for the department's personnel decisions. (133-139a).

In the latter part of 1995, there was a dispute over the City's refusal to fill vacant sergeant positions. Even though there were three vacant sergeant positions, Deputy Chief Kruithoff stated

that the Department would not promote any candidate from the existing promotion list. In fact, within a couple months, the City began the process of creating a new promotion list by offering another written examination. (133-138a).

The POLC objected to the City's refusal to promote candidates from the existing list. The POLC filed a lawsuit for injunctive relief in the Calhoun County Circuit Court requesting an order to enjoin the City from violating the parties' Collective Bargaining Agreement with respect to promotions. The parties settled this lawsuit with an agreement that three promotions would be made from the existing list. (137-138a).

Instead of making just three promotions, the City made four. The fourth promotion was not part of the settlement discussion. The fourth promotion involved a black candidate, Arthur McClenney, and it was the last promotion from the list before it expired. At the time of McClenney's promotion, Michael Lind ranked second and Arthur McClenney ranked fifth among the eligible candidates. (132a).

3. Arthur McClenney's Qualifications

The POLC was surprised with McClenney's promotion. By the time of McClenney's promotion, the City had already provided the written portion of the test to develop the new sergeant eligibility list. McClenney had taken this test and failed it. (135,138-139a).

The second reason for the surprise was that Arthur McClenney was a lackluster candidate for the supervisory position. The City hired Arthur McClenney in 1986, the same year it hired Michael Lind. At the time of his promotion, McClenney only had a high school diploma. He needed a remedial writing class in order to complete his probationary period successfully. In contrast to Michael Lind, Arthur McClenney had no previous supervisory experience in public safety. He received only one meritorious service citation, dated May 3, 1990. Unlike Michael

Lind, McClenney was never designated as Employee-of-the-Month. Compared to Michael Lind, who had broad training and experience in nearly every aspect of police work, McClenney had very limited training. (155-160a).

4. The Decision was Based on Subjective Judgment

The promotion of Arthur McClenney was based on a subjective determination. At his deposition, former Police Chief Thomas Pope testified that his decision to promote Arthur McClenney over Michael Lind was based on a subjective determination:

> I mean, that is entirely fair, that an administrator, in trying to make a **subjective judgment** from among a group of five people, can end up maybe not even picking the right person. That can happen. (*Emphasis added).* (152a).

The only fact that could be cited in Chief Pope's deposition was that he was impressed with "Arthur McClenney's maturity." Chief Pope cited no other factor. In fact, he described Michael Lind as a fine police officer:

> **Q** Alright. He's [Michael Lind] college-educated; Arthur McClenney is not. Michael Lind has prior supervisory experience at Pennfield Township; Arthur McClenney has none. Michael Lind has numerous awards in his personnel file leading up to this discussion. In fact, in 1993 the personnel file shows that you nominated him for Officer-of-the-Month. Arthur McClenney has maybe two awards that I saw up to this point in time. My impression is that Mike Lind has made himself, through training, through his participation and based on his personnel file, an exceptional police officer for the Department. Given those factors, wouldn't you agree somebody would have the grounds to second-guess a **subjective decision** to promote Arthur McClenney over Michael Lind?
>
> **A** Sure. In fact, in my experience which dates back to the 1970's, dealing with these issues, not just as an administrator but as a union representative and on occasion, as a promotional candidate, whenever you have to select from five to pick one, you have one very happy person who feels it was absolutely the right decision, and you have four pissed-off people who feel that the decision was the worst that could have ever been made. **And when you look at those five individuals, you can look at one you picked and subjectively say**, "I feel comfortable that I selected the person I think at this moment in time is best suited to do the job."

Q Alright. Well–

A And still be very proud of the other four as being excellent candidates, absolutely. (*Emphasis added*). (154a).

5. The City's Legitimate, Nondiscriminatory Reason was a Pretext

The City claims it did not promote Lind because of a two-day disciplinary suspension in 1990. As a practical joke, Michael Lind distributed an article lampooning police work. (39a). The Department did not appreciate his sense of humor and disciplined him for copying and distributing the article. Although he disagreed with the discipline, Michael Lind elected not to contest the suspension by filing a grievance.

The City's reference to this suspension violates Lind's rights under the Collective Bargaining Agreement. According to Section 4.6 of the Collective Bargaining Agreement in effect during that time, police officers could request to have disciplinary matters older than two years removed from their personnel file:

> Section 4.6 - Personnel Files: A copy of any disciplinary action which will result in the addition of official entries to the personnel file will be given to the employee. An officer may request a meeting with the Police Chief to review official disciplinary entries to his personnel file that are in excess of two (2) years old with the option, upon concurrence of the employee and the Chief, to remove same from the personnel file. Further, discipline left in the file for five (5) years or more may be removed from the employee's file. All information in the personnel files of the Police Department or the Personnel Office regarding employees in the bargaining unit shall be treated in strict confidence by the City. Personnel files shall be defined and regulated pursuant to P.A. 1978, No. 397; MCLA 423.501 et. seq., as adopted and amended. (97a).

In 1992, Michael Lind requested to have the disciplinary suspension removed from his file. Then Police Chief, Thomas Pope, agreed and even stated to him that the matter was closed. In this regard, Michael Lind testified:

A I had received some discipline. I believe it was the early 90's I received two days off.

Q Was that in connection with that lampooning incident they did?

A Yes. And a little over two years after that I went to Chief Pope. And I talked with him about the incident and asked if that could - we have a clause in the contract to have that discipline removed. And he said that - after our discussion, he said that, yeah, yeah, he would remove it. As a matter of fact, he went out and got my personnel file, and he removed it.

* * *

Q So your understanding, Chief Pope at the time granted your request to remove that from your file?

A Yeah, he took it out right in front of me and threw it away and said that the issue is over and it's closed. (36a).

Despite Pope's assurance and the City's express promise in Section 4.6, the disciplinary suspension kept reappearing. It resurfaced during Michael Lind's deposition in this case and at the oral argument on the City's Motion for Summary Disposition. At oral argument, the City Attorney claimed for the first time that Lind's suspension in 1990, which was removed from his file in 1992, was a legitimate non-discriminatory reason for not promoting him in 1996. During oral argument, the City Attorney argued to the Court:

> He was disciplined as a result of that attempt [at humor] and I think that the remarks of Chief Pope are telling. In that he found the work to be chilling and offensive and it was particularly disturbing to the Chief that thing was distributed by a person who was assigned as a training officer for new officers coming into the department. If there was anything that demonstrates a lack of maturity, a lack of judgment, it was this incident [suspension]. There's nothing I think that needs to be said more. (112-113a).

However, a two-day suspension of a black police officer did not prevent the City from promoting him. Shortly after Michael Lind was denied his promotion opportunity, the City promoted Ray Felix (whose race is black), even through the City suspended Felix in 1995 for criminal misconduct in connection with domestic violence. (129-131a).

6. Evidence of the Decision Makers' Discriminatory Animus

During this time period, Chief Pope and Deputy Chief Kruithoff acted with discriminatory motivation in making promotion decisions within the Police Department.[3] In 1995, Pope and Kruithoff promoted a black female candidate, Diane Cantrell, to the position of Administrative Aide to work in the Police Chief's office. The Police Union protested this assignment because the position was not posted. Two of Michael Lind's witnesses, David Adams and David Walters, reported that Deputy Chief Kruithoff told them on two independent occasions that the City wanted a black female for the position. The Police Union filed a grievance over this promotion which went to arbitration before the Arbitrator, Donald R. Burkholder, Ph.D. At the arbitration hearing, David Adams and David Walters testified that Deputy Chief Kruithoff admitted the promotion to the administrative position was based on the candidate's race and sex. Although both Kruithoff and Chief Pope were present during the arbitration hearing and during the testimony of Adams and Walters, they did not testify or do anything to contradict this sworn testimony. (133-139a).

In a published decision issued in January 1996, the Arbitrator sustained the grievance and ruled that the City violated the Collective Bargaining Agreement in its assignment of the Administrative Aide candidate. In his written opinion, the Arbitrator made the following observation regarding the allegation of race discrimination:

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[3] At his deposition, Kruithoff denied any involvement with Arthur McClenney's promotion. Kruithoff testified that he was out of the state in South Carolina when Arthur McClenney's promotion was announced. However, in response to requests for production for verification from city records of Kruithoff's leave, the City could produce no documentation to substantiate the fact that Kruithoff was on a leave-of-absence during McClenney's promotion. (164-167a). Furthermore, Kruithoff's statement contradicted the testimony of David Adams and Greg Huggett who testified through their affidavits that, during this time period, Deputy Chief Kruithoff was directly responsible for personnel and labor relations matters within the Police Department. (133-139a).

Special note is taken of unrebutted testimony that the Chief said he wanted an individual of certain race, color, and sex to fill the position. It is recognized that the Chief, the Department policy maker, has and should have considerable latitude in filling the Administrative Aide position because of its potentially sensitive nature, and the need for a policy maker to have a trusted assistant. However, this latitude does not extend to playing loose with the Contract as applied in past practice and/or selection on the **basis of unlawful criteria**. (*Emphasis added*). (171a).

7. Other Evidence of Discrimination

In addition to this unrefuted evidence of reverse discrimination, discovery disclosed other evidence that decisions were being made on the basis of race. For example, against the recommendation of field training officers, including Michael Lind, the City allowed a black female, Renee Gray, to complete her probationary period as a police officer, even after it had been extended because of performance issues. White police officers, specifically Matthew Schimmell, were not given similar chances to complete their probationary period. (171-176a).

Also, the City had developed an affirmative action program during the relevant time period. On page 5 of the affirmative action program, the City of Battle Creek adopted the following policy as applied to promotions within the City:

A. The City of Battle Creek shall continue to provide equal employment opportunity for all persons regardless of race, creed, color, sex, national origin, age, handicap, marital status, height, weight or veteran status.

B. **Recruitment, training and promotion for a city position shall be designed to achieve and maintain proportional representation of all protected classes mentioned above.** (*Emphasis added*). (180, 184a).

The City denied that it utilized an affirmative action program in promoting the black candidate, Arthur McClenney, over Michael Lind. According to the City, it never actually implemented this program. (18a).

C. SUMMARY DISPOSITION AND APPEAL PROCEEDINGS

On December 29, 1999, the City filed a Motion for Summary Disposition. The City contended that Michael Lind had not, or could not, establish a *prima facie* case of discrimination. The trial court conducted oral argument on the City's Motion on January 31, 2000. For the first time at this hearing, the City raised Michael Lind's 1990 suspension as an additional ground for summary disposition, contending it provided a legitimate non-discriminatory reason for its failure to promote him. The Plaintiff objected to the City's raising an issue at the hearing which had not been the subject of its brief. (113-114a). In response, the Circuit Court granted the Plaintiff additional time to file a supplemental brief in opposition to the Defendant's Motion for Summary Disposition, and the Court took the Motion under advisement. The Plaintiff filed a supplemental brief regarding the suspension on February 9, 2000. The City filed a response brief on March 2, 2000.

On March 10, 2000, the trial court issued a written opinion granting the City's Motion for Summary Disposition. (9a). In its written opinion, the Court concluded that Michael Lind had not established the necessary elements for a *prima facie* case of reverse discrimination, specifically he had failed to establish "background circumstances supporting the suspicion that the City was discriminating against majority employees." (11a). The trial court also found, without explanation, that there was insufficient evidence presented to show that the stated explanation for Arthur McClenney's promotion was pretextual in nature. (13a). On March 23, 2000, the trial court entered an order based on its written opinion which provided as follows:

> Appearing to this court, based on upon evidence presented, that plaintiff has failed to present sufficient evidence which a reasonable trier of fact could conclude that background/historical circumstances support a suspicion that Defendant City within the Police Department was that unusual employer discriminates against the majority in plaintiff's complaint, therefore it must fail. (15a).

In the meantime, Michael Lind learned that the City had violated Michigan's discovery rules by failing to disclose relevant information. On November 12, 1999, the Plaintiff timely requested that the City provide all affirmative action plans in effect during the relevant time period, especially for the Police Department. (165a). In response to this discovery request, the City supplied an affirmative action program that was in effect from 1989 to 1994. Throughout the discovery proceedings, the City represented to the Plaintiff that this was the only affirmative action program and that it had no application to promotion decisions which took place in 1996. (142-144a). At the oral argument on the City's Motion for Summary Disposition, the City made the same representation to the trial court. In the oral argument, the City's counsel represented to the Court: "In fact, at the time of these promotions, the City's affirmative action plan had expired, so the City was under no affirmative action plan." (108a).

The trial court's opinion relied in part on the City's representations. On page 4 of the trial court's written opinion of March 10, 2000, the court made the factual finding that "there was no evidence to suggest that an affirmative action plan was in existence at the time of the 1996 promotion decision." (12a).

It was not until after the close of discovery, after the City had filed its Motion for Summary Disposition, after the briefs had been submitted and after oral argument that the City disclosed in a letter received on February 9, 2000, that it, in fact, had an affirmative action plan which, on its face, covered the time period of the 1996 promotions. (182a). The Plaintiff did not receive the City's 1996 Affirmative Action Plan until well after the deadline for responding to the Plaintiff's request to produce documents, until after the close of discovery, until after the City had filed its Motion for Summary Disposition and until after the briefs had been filed and until after oral argument.

Consequently, the Plaintiff filed a Motion for Reconsideration, arguing that palpable error had been committed. The Motion for Reconsideration also contended that the City's abuse of the discovery rule justified reconsideration. In the alternative, assuming that the City acted under its affirmative action program, the Plaintiff requested the trial court's permission to amend its complaint to assert a constitutional violation of his equal protection rights under Michigan's Constitution.

The City responded to the Motion for Reconsideration by contending that the affirmative action program was never implemented by the City of Battle Creek and that it was never used in the 1996 promotions. (17a).

The trial court accepted this representation at face value and denied the Plaintiff's Motion for Reconsideration and Petition to amend his complaint. A final order was issued in the case denying the Motion for Reconsideration on May 28, 2000. (30a). The Plaintiff timely filed his Claim of Appeal to the Court of Appeals on June 8, 2000.

On July 9, 2002, the Michigan Court of Appeals issued a per curiam, unpublished decision affirming the trial court's grant of summary disposition. (31a). The Court of Appeals concluded that there was no direct evidence of discrimination, that Michael Lind failed to establish any legitimate issue of material fact as to background circumstances for the purposes of proving a *prima facie* case of discrimination and, further, that the City had a legitimate non-discriminatory reason – maturity – to promote the lesser qualified candidate over him. (32a).

On July 21, 2002, Michael Lind filed his Application for Leave to Appeal. During the pendency of his Application, the Michigan Court of Appeals ruled that the "background circumstances" test was inconsistent with the CRA. *Venable v General* Motors *Corp* (on remand), 253 Mich App 473; 656 NW2d 188 (2002). Michael Lind filed a supplemental brief on

this issue, and the City filed a response objecting to the supplemental filing. On March 25, 2003, the Supreme Court granted the Application for Leave and instructed the parties to brief whether the background circumstances standard is inconsistent with the CRA and, if so, whether it is also inconsistent with the Equal Protection Clause of the Michigan Constitution, Const 1963, art 1, § 2, and the Federal Constitution, US Const, Am XIV. (34a). Michael Lind, hereby submits his Appellant's Brief.

ARGUMENT

SUA SPONTE REVIEW OF STATUTORY AND CONSTITUTIONAL ISSUES

In granting the Appellant's Petition for Leave to Appeal, the Supreme Court specifically requested that the parties address the issue as to whether the "background circumstances" standard violates the Michigan Civil Rights Act, and if not, whether it violates the United States Constitution, Fourteenth Amendment, Am XIV, and Michigan's state Constitution, Const 1963, art 1, § 2 relating to the Equal Protection Clause. (34a). The Appellee/Defendant has objected to raising the statutorial and constitutional issues because Michael Lind did not assert these arguments in the proceedings below. However, as pointed out in the Appellant's Supplemental Brief in Support of the Application for Leave to Appeal, a shift in the law has occurred overturning a key legal component on which the trial court and Court of Appeals predicated their decisions to deny Michael Lind his day in court. In *Venable v General Motors Corp* (on remand), 253 Mich App 473; 656 NW2d 188 (2002), the Michigan Court of Appeals ruled that the "background circumstances" standard violated the CRA.

In any event, the Michigan Supreme Court has discretion to enter any judgment or order or grant any relief as the case may require on a *sua sponte* basis. The Michigan Court Rules, MCR 7.316(A)(7), relating to the authority of the Supreme Court provide as follows:

The Supreme Court may at any time, in addition to its general powers:

> (7) enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require . . ..

In addition, MCR 7.302(F)(4)(a) provides that an appeal is limited to the issues raised in the application for leave to appeal, "[u]nless otherwise ordered by the Court."

The Michigan Supreme Court has, in fact, employed this authority to make rulings *sua sponte* in connection with alleged constitutional violations. *See Caterpillar v Dept of Treasury*, 440 Mich 400, 407, n 6; 488 NW2d 182 (1992). In addition, the Michigan Supreme Court has reviewed *sua sponte* alleged violations of Michigan statutes. *See Weller v Speet*, 275 Mich 655, 660; 267 NW2d 758 (1936) (Even though the error was not alleged in the grounds of appeal, the Supreme Court, *sua sponte*, reversed a judgment which violated the plain mandate of the statute.) Therefore, the Supreme Court is well within its authority and discretion to review the statutory and constitutional validity of the "background circumstances" standard.

I. THE BACKGROUND CIRCUMSTANCES STANDARD VIOLATES MICHIGAN'S CIVIL RIGHTS ACT.

The "background circumstances" test is invalid. It is invalid for a simple yet compelling reason. The "background circumstances" test violates the plain language of Michigan's Civil Rights Act ("CRA"), MCL 37.2101; MSA 3.550(2101). This statute states, in relevant part:

> (1) An employer shall not do any of the following:
>
> > (a) Fail or refuse to hire or recruit, discharge or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, **race**, color, national origin, age, sex, height, weight or marital status. (emphasis added).

This statute makes no reference to imposing different standards of proof because of a victim's race.

Nonetheless, in *Allen v Comprehensive Health* Services, 222 Mich App 426; 564 NW2d 914 (1997), the Michigan Court of Appeals imposed a higher standard of proof on Caucasian males. *Allen* modified the McDonnell Douglas framework for deciding employment discrimination cases by adding the "background circumstances" test. Michigan courts apply the McDonnell Douglas framework for deciding race discrimination claims under the CRA. *Town v Michigan Bell Telephone* Co, 455 Mich 688; 568 NW2d 64 (1997). Traditionally in a promotion case, the McDonnell Douglas' criteria for establishing a *prima facie* case of discrimination contains only three elements: 1) that the plaintiff applied and was qualified for the available promotion; 2) that despite the plaintiff's qualifications, he was not promoted; and 3) that, in this case, an employee of a different race of similar or lesser qualifications was promoted. Upon this showing, a presumption of discriminatory intent is established for possible rebuttal by the employer. *See, Allen*, 222 Mich App at 433.

The Michigan Court of Appeals in *Allen* was confronted with a reverse employment discrimination case under the CRA. The *Allen* court determined that before white males can establish a *prima facie* case, they must show "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the [majority]." This additional element became known as the "background circumstances" test. *Id.* at 433.[4]

A. The Court of Appeals Rejected "Background Circumstances"

In *Venable v General Motors Corp (on remand)*, 253 Mich App 473; 656 NW2d 188 (2002), the Michigan Court of Appeals ruled that the additional test of "background circumstances" violates the CRA. As aptly observed by the Michigan Court of Appeals, by adding the "background circumstances" to the McDonnell Douglas framework, *Allen* makes it

[4] The Michigan Supreme Court granted leave to consider the "background circumstances" test in *Allen*. However, the parties settled the case and dismissed the appeal without decision.

more difficult for a Caucasian male plaintiff employee than for an African-American or female plaintiff employee to allege employment discrimination. *Id.* at 480. The Court of Appeals in *Venable* concluded that the "background circumstances" test was inconsistent with the CRA and that *Allen* was wrongly decided. *Id.* at 477. The CRA does not make any distinction concerning whether an employee alleging race discrimination is Caucasian, African-American or any other race or ethnic origin. The *Venable* court stated:

> In our opinion, the "background circumstances" test imposed by *Allen* in evaluating reverse employment discrimination claims is inconsistent with the Michigan Civil Rights Act. The Civil Rights Act does not make a distinction concerning whether an employee alleging race discrimination is Caucasian or African-American. It only provides that "[a]n employer shall not . . . discriminate against an individual with respect to employment . . . because of religion, race, color, national origin, age, [or] sex . . ." MCL 37.2202(1)(a). That is, *any individual*, Caucasian or African-American, male or female, is protected from race or sex discrimination under the Civil Rights Act. Consequently, ordinary and reverse discrimination claims are equally sustainable under the Civil Rights Act. See *Pierce, supra*. Therefore, we hold that the *Allen* Court erred in adding the "background circumstances" test to a prima facie case for plaintiffs alleging reverse discrimination in employment. *Id.* at 480-481.

The *Venable* Court of Appeals concluded that each individual, regardless of race or gender, is protected from race or sex discrimination by the CRA. Consequently, the *Allen* "background circumstances" test was a mistake.

B. Disagreement in Federal Courts

As noted by *Venable*, 253 Mich App at 478, the origin of the "background circumstances" test can be traced to a United States Court of Appeals decision from the District of Columbia, *Parker v Baltimore & Ohio RR Co*, 652 F2d 1012 (DC Cir 1981). The *Parker* precedent is mostly eroded and, in fact, has been rejected by many federal courts.

The *Parker* precedent was of questionable validity from its inception. *Parker* superimposed the "background circumstances" test on the McDonnell Douglas standard for

establishing a *prima facie* case of discrimination under Title VII, 42 USC 2000e, *et seq.* However, the addition of this test was, at least tacitly, inconsistent with the United States Supreme Court precedent. In *McDonald v Santa Fe Transportation Co*, 427 US 273 (1976), the United States Supreme Court ruled that Title VII protected white employees from employment discrimination. Justice Marshall, who delivered the opinion in *Santa Fe*, recognized that white persons are protected from civil rights violations under Title VII. Furthermore, Justice Marshall specifically applied the McDonnell Douglas *prima facie* framework in its original, unaltered form. He imposed no additional tasks or burdens on white victims of civil rights discrimination. *Id.* at 283-285.

The United States Supreme Court declined a subsequent opportunity to alter the *prima facie* standard for majority plaintiffs in a case involving reverse gender discrimination. In *Johnson v Transportation Agency, Santa Clara County*, 480 US 616 (1987), the United States Supreme Court specifically held that reverse discrimination disputes arising from affirmative action programs "fit readily within the analytical framework set forth in the *McDonnell Douglas Corporation*." *Id.* at 626-627.

Many federal courts have refused to apply the *Parker* "background circumstances" test. The test has been rejected by federal courts in the First Circuit Court of Appeals. *See, Eastridge v Rhode Island College*, 996 F Supp 161, 166 (D RI 1998). It has been rejected by the Second Circuit Court of Appeals. *See Vallone v Lori's Natural Food Center, Inc*, (WL 1012668)(CA 2, 1999)[5]; it has been rejected by federal courts in the Fifth Circuit Court of Appeals, *Ulrich v Exxon Co*, 824 F Supp 677, 683-684 (SD Tex, 1993). It has been rejected by courts within the Eighth Circuit. *See, Collins v School Dist of Kansas City*, 727 F Supp 1318, 1322-1323 (D Mo 1990). In the Eleventh Circuit Court of Appeals, federal courts apply the traditional McDonnell

Douglas standard to reverse discrimination cases. *See, Shealy v City of Albany*, 89 F3d 804, 805 (CA 11, 1996).

The Sixth Circuit Court of Appeals initially adopted the "background circumstances" test in *Murray v Thistledown Racing Club, Inc*, 770 F2d 63 (CA 6, 1985).[6] However, the Sixth Circuit has regretted the *Murray* decision. In *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, (CA 6, 1994), the Sixth Circuit commented upon the heightened standard imposed upon reverse discrimination claims:

> [we have] serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts. *Id.* at 801, n7.

This reservation in *Pierce* was echoed again by a more recent Sixth Circuit Court of Appeals decision in *Zambetti v Cuyahoga Community College*, 314 F3d 249, 257 (CA 6, 2002). In this case, the Sixth Circuit Court of Appeals expressed the following misgivings regarding the "background circumstances" test:

> Additionally, we note that the "background circumstances" prong, only required of "reverse discrimination" plaintiffs, may impermissibly impose a heightened pleading standard on majority victims of discrimination. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n. 7 (6th Cir.1994); *Ulrich v. Exxon Co.*, 824 F.Supp. 677, 683-684 (S.D.Tex.1993) (collecting cases). In *Pierce*, another panel of this court stated, "[w]e have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts." 40 F.3d at 801 n. 7. The panel, though, found it was unnecessary to reach the issue because the plaintiff did not satisfy another portion of the *prima facie* case. *Id.* We share the concern that, in a case such as this one, where the plaintiff has created a genuine issue of a material fact on pretext, *see infra*, Section B, the potential application of a heightened pleading standard could be the difference between granting and denying summary judgment. *Id.* at 257.

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[5] A copy of this decision is included in the Appendix at 189-191a.

[6] The "background circumstance" test has also been used by the Seventh Circuit Court of Appeals in *Miller v Health Care Services Corp*, 171 F3d 450, 457 (CA 7, 1999) and by the Tenth Circuit Court of Appeals in *Reynolds v School Act No 1*, 69 F3d 1523, 1524 (CA 10, 1995).

United States Federal District Courts in Michigan have also expressed disagreement with the "background circumstances" test. For example, *Herendeen v Michigan State Police*, 39 F Supp 2d 899 (WD Mich, 1999), involved the defendant State Police's summary judgment motion in a reverse discrimination case over promotions in the State Police department. In denying the motion, Judge Quist criticized the "background circumstances" test in the following statement:

> Other Sixth Circuit panels have expressed "serious misgivings about the soundness of [the Jasany] test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts." Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n. 7 (6th Cir.1994). This Court joins those misgivings. Attitudes and the political balance in some public entities have substantially changed since 1964 and 1985, leading to situations in which "affirmative action" or "achieving diversity" are the norm rather than the exception. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276, 106 S.Ct. 1842, 1848, 90 L.Ed.2d 260 (1986) (finding that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" and holding invalid layoff plan favoring minority teachers over non-minority teachers); Wessmann v. Gittens, 160 F.3d 790, 808 (1st Cir.1998) (finding school admissions policy using set- asides based upon racial/ethnic considerations as violative of the Equal Protection Clause); Middleton v. City of Flint, 92 F.3d 396, 413 (6th Cir.1996) (holding unconstitutional city's affirmative action plan requiring 50% of all police officers promoted to sergeant be members of specified minorities). Nonetheless, the standard adopted in Jasany remains the law in the Sixth Circuit. *Id.* at 909 n5.

Therefore, the "background circumstances" test has been rejected by many federal courts. The Sixth Circuit Court of Appeals has expressed grave reservations over its validity. The United States Supreme Court has never embraced a different standard for majority plaintiffs under Title VII and, in fact, in cases involving reverse discrimination, the United States Supreme Court has applied the same standard of proof that was applied to racial minorities.

The Michigan Supreme Court should adopt the Michigan Court of Appeals holding in *Venable*. Clearly, the Michigan legislature did not intend to protect persons of certain races more or less than persons of other races. The only interpretation that can stand the test of time is one which places all Michigan citizens on an equal footing with respect to the protections

afforded by the CRA. On this basis alone, the Court of Appeals' decision should be reversed, and Michael Lind should be allowed to have his day in court.

II. THE BACKGROUND CIRCUMSTANCES STANDARD IS UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION, US CONST, AM XIV.

Assuming for the sake of argument that the "background circumstances" test is compatible with the Michigan Civil Rights Act, it still violates the United States Constitution's guarantee of equal protection. The Michigan Court of Appeals acknowledged this distinct possibility in its *Venable* decision. The *Venable* court observed that the "background circumstances test in *Allen*'s *prima facie* case for reverse discrimination claims also may be violative of equal protection and due process." 253 Mich App at 481, n 9.

There is no maybe about it. The "background circumstances" test cannot withstand constitutional scrutiny. As is readily acknowledged by the *Venable* case, the "background circumstances" test imposes a greater burden on white victims of discrimination than it does on other groups. *Id.* at 480. Consequently, the "background circumstances" test represents a classification that burdens one group solely because of its race. This distinction violates the Fourteenth Amendment to the United States Constitution which states, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A. Highest Level of Judicial Scrutiny

The first step in the equal protection analysis is to ascertain the level of judicial review. The United States Supreme Court has ruled that race classifications of any sort are inherently suspect and, thus, call for the most exacting judicial examination. Race classifications, even those imposed on white males, are subjected to strict scrutiny.

Adarand Contractors, Inc v Pena, 515 US 200, 220 (1995); *City of Richmond v JA Croson Co*, 488 US 469 (1989).

The *Pena* decision is instructive on the fact that the highest level of judicial scrutiny applies to race classifications, even classifications that disadvantage whites. *Pena* involved an equal protection challenge to a federal program designed to provide highway contracts to minority business enterprises. In that case, the United States Supreme Court ruled that all racial classifications, whether imposed by a federal, state or local government actor, must be analyzed by the reviewing court under strict scrutiny. 515 US at 220-222, 224. *See also City of Richmond v JA Croson Co*, 488 US 469, 493-494 (1989).

Consequently in *Pena*, the United States Supreme Court determined that any government racial classification must first be reviewed with intense skepticism. Any preference based on racial or ethnic criteria must necessarily receive a most searching examination. They are constitutional only if they are narrowly tailored and further compelling governmental interests. 515 US at 228.

This means that the "background circumstances" test is subject to the highest level of judicial scrutiny. A classification that burdens white victims of civil rights violations is inherently suspect. *Pena*, 515 US at 227, *supra*. In order to justify a race-based classification, it must be supported by compelling state interest **and** the means chosen to accomplish the compelling state interest must be narrowly tailored. *Id.*

B. Background Circumstances Cannot Survive Strict Scrutiny

It is difficult to envision any compelling government interest for placing an extra burden on one group of civil rights victims because of their race. Historically, the United States Supreme Court has recognized only two compelling state interests justifying race classifications.

One compelling interest is remedial action to correct specific cases of race discrimination. It is true that during World War II, the government justified wholesale internment of Japanese-Americans on the basis of a war necessity, but the benefit of historical hindsight has discredited this government interest. *See Korematsu v United States*, 323 US 214, 216 (1944); *Hirabayashi v United States*, 320 US 81, 100 (1943). A second compelling governmental interest is that racial classifications are justified to remedy specific instances of past discrimination. *Croson*, 488 US at 498-500, 507, *supra*. However, attempts to remedy general "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 497. It is impossible to discern any compelling government interest for imposing a greater standard of proof on white victims of civil rights violations.

Even if some compelling interest could be articulated, it could never satisfy the second prong of the highest scrutiny test - narrowly tailored to achieve its objective. It seems reasonable that all persons in Michigan should have an equal chance to a jury trial of their peers on civil rights violations.

The highest level of judicial scrutiny for race classifications rests on a very basic legal concept. The United States Supreme Court has repeatedly noted that the rights created by the Fourteenth Amendment are, by its terms, guaranteed to the individual, not to groups. The Equal Protection Clause protects personal rights. *Croson*, 488 US at 493, *supra*. Absent searching judicial inquiry into the justification for race-based measure, there is simply no way of determining whether classifications are benign, remedial or what classifications are, in fact, motivated by illegitimate notions of racial inferiority or racial politics. *Id.*

Some may argue that the Equal Protection Clause was an historical phenomenon firmly anchored to the history of our Civil War. Unquestionably, the Equal Protection Clause arose out

of this historical context and the history of racial prejudice against African-Americans. Students of American history should never diminish the injustice of slavery and the injustices inflicted through racial prejudice, which still linger today. However, though African-Americans can claim a large share of the racial prejudice, they cannot claim a monopoly. Prejudice transcends all color lines. Historically, one of the most tragic and virulent forms of prejudice was white vs. white anti-Semitism which lead to the extermination of German Jews in Nazi Germany.[7]

At various points in this nation's history, any number of groups have been targeted for racial prejudice. At one time, Irish-Americans were the victims of ethnic prejudice, another time it was the Chinese. During World War II, Japanese Americans were targeted for racial prejudice. Today, the Equal Protection Clause stands as an important shield for Arab-Americans.

Equal protection, regardless of race, is an ideal that should suffer no compromise. The fact that all individuals, regardless of race, stand equal under the law is one of the highest accomplishments of our American jurisprudence. The "background circumstances" standard is a derogation of this constitutional principle and a blemish on the ideal of equality under the law.

III. THE BACKGROUND CIRCUMSTANCES STANDARD VIOLATES MICHIGAN'S CONSTITUTIONAL PROVISION GUARANTEEING EQUAL PROTECTION.

Michigan Const 1963, art I, Section 2 also provides that no person shall be denied the equal protection of the law.

> No person shall be denied the equal protection of the laws. Neither shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

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[7] Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (New York: Vintage Books, 1997).

The Michigan Supreme Court has found Michigan's equal protection provision to be coextensive with the Equal Protection Clause of the federal Constitution. *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000); *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996). ("[T]he Michigan and Federal Equal Protection Clauses offer similar protection." *Id.* at 183. The Michigan Supreme Court has employed the highest level of judicial review or strict scrutiny for classifications based on suspect factors such as race, national origin or ethnicity. *See Crego* at 463 Mich at 259. Again, it is simply difficult to conceive of any compelling governmental interest that is advanced by imposing a higher burden of proof on white victims of civil rights violations. Even if there is some governmental interest, an automatic classification is incompatible with the concept of least restrictive means. An employer who is accused of discriminating against majority plaintiffs can always make the argument to the jury that it is not one of those unique employers who discriminates against white males. Consequently, the "background circumstances" test is unconstitutional under Michigan's Equal Protection Clause.

IV. THE COURT OF APPEALS' DECISION WAS CLEARLY ERRONEOUS SINCE IT VIOLATED THE DE NOVO STANDARD OF REVIEW FOR SUMMARY DISPOSITION.

A. Standard of Review

Even assuming that "background circumstances" is a valid test, there are substantial questions of fact which preclude summary disposition. A decision to grant a motion for summary disposition is reviewed *de novo*. *Crawford v Department of Civil Service*, 466 Mich 250; 645 NW2d 6 (2002).

The standard for summary disposition is stringent. In denying the Plaintiff's right to a jury trial, the Court of Appeals is to consider all the affidavits, pleadings, depositions, admissions and documentary evidence in the light most favorable to the party opposing the motion, in this

case, Plaintiff/Appellant Michael Lind. *Weymars v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). Summary disposition is appropriate only if it is impossible for the non-moving party cannot support his claim at trial. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 *rehrg den*, 568 NW2d 670 (1970). The trial court is not permitted to assess credibility or to determine facts on a motion for summary disposition. *Downey v Charlevoix County Bd of Road Com'rs*, 227 Mich App 621, 626; 576 NW2d 712 (1998). Instead, summary disposition is inappropriate, especially where there are issues of motive, intention or other conditions of mind and where the credibility of witnesses is crucial. *See Vanguard Ins Co v Bolt,* 204 Mich App 271, 276; 514 NW2d 525 (1994).

In addition, there is one other consideration that applies in this case. A motion for summary disposition is to be based on the absence of legitimate, material facts. It is not to be based on inadmissible evidence, which should have no part of a summary disposition proceeding. *See McCallum v Dept of Corrections*, 197 Mich App 589, 603; 496 NW2d 361, *lv app den*, 422 Mich 928; 503 NW2d 902, (1992) (inadmissible hearsay could not be used in a summary disposition proceeding).

An employment discrimination case can be established one of two ways. First, it can be established through indirect evidence by establishing a *prima facie* case. In the alternative, it can be established by showing direct evidence of *discriminatory animus*. *See Herendeen v Michigan State Police*, 39 F Supp 2d 899, 906 (WD Mich, 1999).

Although the Court of Appeals paid token acknowledgment to the *de novo* standard of review, the Court of Appeals faltered in its application. The Court of Appeal's decision cited to facts out of context, cited facts at the expense of ignoring other critical contradictory facts and ignored other factual components altogether.

B. The Court of Appeals' Decision was Clearly Erroneous in Failing to Find Background Circumstances for Establishing a Prima Facie Case of Reverse Discrimination

Even if the "background circumstances" standard is valid, there were more than enough facts in dispute to satisfy this standard for establishing a *prima facie* case of discrimination. The Court of Appeals misapplied the standard of what is required for establishing background circumstances. The burden of proof for establishing a background suspicion for reverse discrimination is not burdensome.

In *Zambetti v Cuyahoga Community College*, 314 F3d 249 (CA 6, 2002), the United States Sixth Circuit Court of Appeals described the "background circumstances" standard as follows:

> To establish such background circumstances, the plaintiff can present evidence of [defendant's] unlawful consideration of race as a factor in hiring in the past justifies a suspicion that incidents of capricious discrimination against whites because of their race may be likely. *Id.* at 256.

The *Zambetti* case involved promotion decisions in a college police department. The mere fact that the person in charge of the hiring was a different race was sufficient to satisfy "background circumstances." *Id.* at 257.

The fact of background circumstances is not a high standard to satisfy is also illustrated in *Herendeen v Michigan State Police,* 39 F Supp 2d 899 (WD Mich 1999). For example, in *Herendeen, supra,* the fact that the plaintiffs had presented evidence that the Michigan State Police considered race and gender as factors in other cases in promotions was sufficient to establish background circumstances. Likewise in *Herendeen,* the fact that the plaintiffs' qualifications were superior to the those of the minority and female candidates was independent and established the requisite background circumstances. *Id.* at 908.

Other federal cases emphatically demonstrate that the requirement of background circumstances is not a onerous standard. For example, in *Bishopp v Dist of Columbia*, 788 F2d 781, 787 (CA DC, 1986), it was sufficient to demonstrate that a defendant/employer promoted a less qualified minority police officer based on the use of subjective, rather then objective criteria. In *Lamphear v Prokop*, 703 F2d 1311, 1315 (CA DC, 1983), it was sufficient to demonstrate that a white employee was passed over for a black employee whose qualifications were not fully checked, especially where there was pressure to increase minority percentages.

In the instant action, Michael Lind proffered substantial evidence of background circumstances.

1. Direct Testimony of *Discriminatory Animus* in Another Promotion

The two decision makers in Michael Lind's promotion, Chief Thomas Pope and Deputy Police Chief Kruithoff, exhibited discriminatory motives in another promotion during the same relevant time period. Their decision to promote a candidate to an administrative position on the basis of race and sex constitutes direct evidence of *discriminatory animus*, especially since they were the decision makers in Michael Lind's case.

In 1995, the City announced its decision to promote a black female police officer to work in the Chief of Police's and Deputy Police Chief's offices in an important administrative aide position. The police Union filed a grievance challenging this promotion decision. At the arbitration hearing, two executive members of the POLC, David Adams and David Walters, testified that Deputy Police Chief Kruithoff, on two independent occasions, admitted that the decision to promote the candidate to the administrative aide position was based on the race and sex of the candidate. (133-139a). Consequently, the arbitrator found that there was **unrebutted evidence** that the "Chief had acted with a discriminatory motive in the appointment of this

candidate." (171a). These uncontroverted facts established that reverse discrimination was occurring at the highest levels in the Battle Creek Police Department.

2. Disparity in Qualifications

Disparity in qualifications satisfies the "background circumstances" test. The fact that Michael Lind was substantially more qualified than the black candidate independently establishes a background suspicion of discriminatory motive. *See Herendeen*, 39 F Supp 2d at 908, *supra*. The disparity in qualifications between Michael Lind and Arthur McClenney can only be characterized as astounding. Michael Lind scored higher on the promotion examination. Michael Lind had previous supervisory experience in the Pennfield Township Police Department. He possessed a college degree from Western Michigan University, and was attending law school at the time of his failed promotion. He had compiled an outstanding record as a City Police Officer. He received numerous unit citations; numerous personal citations; excellent performance reviews; letters of commendation from citizens, other members of the law enforcement and the legal community; served as a field training officer, training new recruits in use of deadly force; and had experience in nearly all aspects of the Police Department, from the K-9 section to the Special Investigations Unit involving narcotics investigations where he worked under cover. (46-94a).

In contrast, Arthur McClenney had no previous supervisory experience in public safety. He had and still has no college education. He had to take a remedial writing course in order to complete his probationary period as a police officer. He compiled a lackluster record. He was never nominated for nor designated as employee-of-the-month. He never received any special commendations. (155-160a).

At the time he was promoted, it was common knowledge that McClenney had flunked the written examination for the succeeding promotion list for sergeant. (135,138a). Given these facts and the disparity between the qualifications of Michael Lind and Arthur McClenney, there can only be one logical inference - there were background circumstances to suspect that race was a determining factor in his promotion.

3. Violation of Defendant's Past Practices in Promotions

There is another factual basis for establishing background circumstances. Michael Lind produced direct testimony from three members of the POLC that the City had a past practice of promoting in rank order down the list. It is true that the Collective Bargaining Agreement granted the City the discretion to promote among the top five individuals on a promotion list, but in actual practice, the promotions occurred in rank order from the highest to the lowest score. (134,138a).

However, on page 2 of its decision, the Court of Appeals mistakenly concluded that the City's contractual discretion insulated its decision from scrutiny under the Civil Rights Act. Under this theory, an employer at will, who always exercises discretion, could ignore the Civil Rights Act with impunity. (32a).

It was not until the McClenney promotion that the City began skipping over those candidates with higher scores.. Arthur McClenney represented the fourth promotion after the Union's lawsuit, which was unanticipated, and which was a surprise to the Union's Executive Counsel. (135, 138a). There is a legitimate question of fact as to why the Police Chief suddenly chose to deviate from an established pattern of promoting straight down the list in rank order.

4. Promotion was Based on Subjective Judgment

Even though candidates must go through a vigorous testing procedure and are ranked according to their scores, Police Chief Thomas Pope admitted he based his decision on his subjective judgment. (152a). Although by itself, subjective criteria may be insufficient to establish a *prima facie* case, combined with other factors, such as disparity of qualifications, a subjective determination should qualify as "background circumstances," especially when the decision maker overrides objective criteria. *See Bishopp v District of Columbia*, 788 F2d at 787, *supra*. ("[A] defendant's reliance on subjective as opposed to objective factors requires a court to employ heightened scrutiny.").

5. Other Evidence of Discrimination

There is additional evidence indicating background circumstances of reverse discrimination. As noted in *Herendeen*, a plaintiff can rely on past promotion decisions, though barred by the statute of limitation, to show background circumstances. 39 F Supp 2d at 907. Sometime prior to the promotion of Arthur McClenney, the City was confronted with the exact same scenario, except it involved the failure to promote a black female, Edwina Keyser, to a detective position. Even though she was ranked higher on the detective eligibility list, the City selected a white male candidate with a lower score for promotion. After she filed a charge of discrimination, the City settled her claim by giving her the detective position with retroactive seniority and back pay. (161-163a). Michael Lind is similarly situated, but the City refuses to redress his claim.

There have been other personnel decisions which have been racially motivated. A black female, Renee Gray, was allowed to pass an extended probationary period against the

recommendation of the field training officers, even though white officers were not provided with the same opportunity. (171-176a).

Lastly, there is the belatedly produced affirmative action policy, a copy of which the City neglected to provide in responses to discovery requests. The City claims that its affirmative action policy was never implemented and, therefore, has no relevance in this case. This may be so, but nevertheless the policy, which was approved by the City Council, articulated the goal of promoting racial minorities based on proportionate representation in the community. (184a). The same type of policy statement was cited as a relevant factor in *Herendeen*, *supra*, for finding background circumstances of reverse discrimination. 39 F Supp 2d at 909.

C. Court of Appeals Improperly Discounted the Direct Evidence of Discrimination

The *prima facie* case is only one method for establishing an employment discrimination case. A second method is to show direct evidence of a discriminatory animus. Michael Lind satisfied this burden. He presented solid facts that the decision makers who denied his promotion, exhibited racial bias in another promotion. As noted above, an arbitrator made a finding of fact that the police chief and deputy police chief promoted a black female based on racial criteria. (171a). This finding was supported by two affidavits of POLC union officers. Minimally, this should have created a question of fact.

Yet, the Court of Appeals sustained summary disposition on page 2 of its opinion. The Court of Appeals failed to see a connection between this promotion and Michael Lind's denied promotion. Yet they are very similar. Both decisions were made by the same individuals, and the candidates for both promotions came from the same class of employees.

The Court of Appeals' decision wrongfully applied a very narrow definition of direct evidence. The Court of Appeals improperly discounted the fact that the same decision makers

operated with a discriminatory motive in another promotion decision involving the same class of employees. The Court of Appeals' decision seemed to define "direct evidence" to require a confession by the decision maker that he or she was motivated to discriminate on the basis of illegal criteria in the employment decision at issue.

This narrow definition is not supported by the case law cited in the Court of Appeals' decision. The Court of Appeals relied on *Hazel v Ford Motor Co*, 464 Mich 456; 628 NW2d 515 (2002). However, the Michigan Supreme Court in *Hazel* merely defined what is meant by direct evidence. In *Hazel*, the Michigan Supreme Court relied on a definition utilized by the Sixth Circuit Court of Appeals in defining direct evidence as:

> Evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Id* at 462, *citing Jacklin v Schering-Plugh Health Care Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

Michael Lind produced two eyewitnesses, David Adams and David Walters, who testified in their affidavits that the decision makers in Michael Lind's case acted on illegal motivations in another promotion decision during the same relevant time period. The fact that Michael Lind is able to attribute to the decision makers unlawful discrimination in another promotion decision during this same time period should qualify as direct evidence that would cause an independent, reasonable juror to believe that unlawful discrimination was at least a motivating factor in the employer's decisions. Certainly, in giving Michael Lind the benefit of the doubt in the summary disposition motion, this evidence should have been enough to create a legitimate issue of material fact that should have been allowed to go to a jury.

That was clearly the holding in the Federal District Court case of *Herendeen* v *Michigan State Police*, 39 F Supp 2d 899, (WD Mich 1999). *Herendeen* provides a vivid illustration that the Police Chief and Deputy Police Chief's discriminatory motives exhibited in another promotion provide direct evidence of discrimination.

The facts in *Herendeen* are strikingly similar to the facts here. In *Herendeen*, white male state police troopers sued the State Police Department alleging that the Department failed to promote them to a sergeant position because of their race and gender. The State Police Department filed a motion for summary judgment. After reviewing the evidence submitted, Judge Quist denied the State Police Department's motion for summary judgment because he found that the plaintiffs had established both direct evidence of discrimination and, in the alternative, they had satisfied the reverse discrimination standard for a *prima facie* case.

In *Herendeen*, the plaintiffs presented direct evidence that the Michigan State Police hierarchy encouraged the department to take race and gender into consideration in making decisions about which troopers to promote. This was sufficient to establish direct evidence of discrimination, even though the plaintiffs could not show that the policy of reverse race and gender discrimination was attributed to and implemented by the decision makers who made the actual promotion decisions affecting them. In this regard, Judge Quist wrote in his opinion:

> In this case, plaintiffs' evidence consists of statements from the MSP's chief policymaker that managerial employees were expected to take race and gender into consideration in determining which trooper to promote - - the employment action at issue in this case. Testimony from lower-level officers and other evidence demonstrates that this policy was put into effect when promotion decisions were made.
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> Moreover, although defendants contend that plaintiffs have not proven that Robinson's policy was not implemented by the decision makers who made the promotion decisions at issue, it may be reasonably inferred that Robinson, as head of the MSP, made policies that were expected to be and were in fact followed within the MSP. *Id.* at 907.

Judge Quist noted that direct evidence relates to statements attributed to the decision maker in the same or **other cases**. Furthermore, Judge Quist held that evidence of promotion decisions that were based upon race or gender which occurred in the past still constituted direct evidence. *Id.* at 907. Even a manager's generalized statement of racial bias satisfies the direct evidence requirement. For example, *Herendeen* cited to the case of *Talley v Bravo Patino Restaurant, Ltd*, 61 F3d 1241 (CA6, 1995). In *Talley*, the Plaintiff, who claimed he was terminated from his employment because he was black, presented evidence that the owners of the restaurant occasionally made disparaging remarks about blacks. This constituted direct evidence of discrimination. 39 F Supp 2d at 906.

The touchstone for direct evidence is that discriminatory statements are made by the decision makers either in the context of the specific employment decision at issue or in the contexts of other decisions. In *Herendeen*, Judge Quist denied the motion for summary disposition, even though the plaintiff police officers did not show that they were directly affected by the discriminatory policy. Instead, from the direct evidence offered, it could reasonably be inferred that policies of discrimination existed. *Id* at 907.

Clearly, based on *Hazel* and *Herendeen* and in light of the *de novo* standard of review for summary disposition motion, evidence that the decision makers exhibited *discriminatory animus* in other promotions presents a legitimate issue of material fact.

V. THE COURT OF APPEALS' DECISION IS CLEARLY ERRONEOUS AND CONFLICTS WITH THE CASE OF *LAITINEN v CITY OF SAGINAW*, 213 MICH APP 130; 539 NW2D 515 (1995).

On page 3 of its opinion, the Michigan Court of Appeals based its decision to approve an award of summary disposition in this case in part because other white applicants, other then the plaintiff, had been promoted. (33a.). This rationale directly conflicts with the Court of Appeals' decision in *Laitinen v City of Saginaw,* 213 Mich App 130; 539 NW2d 515 (1995).

Laitinen involved a case of reverse discrimination under the Elliot-Larsen Civil Rights Act. The plaintiff in *Laitinen* applied for a job as plant maintenance supervisor in one of the defendant/employer's waste water treatment plants. He was one of nine candidates who successfully completed the initial screening and interview process, and he had received the second highest composite interview score in the group. Nevertheless, the City promoted a black candidate who ranked lower on the list. The trial court dismissed the reverse discrimination case because it reasoned that the plaintiff lacked standing. The trial court reasoned that, even if the minority candidate had not been selected for the job, the plaintiff could have not demonstrated that the job would have been awarded to him, since he did not have the highest score. Therefore, the plaintiff had no standing since he could not demonstrate an actual injury. *Id.* at 132.

The Michigan Court of Appeals disagreed. The claim of unlawful discrimination may be based upon the loss of an equal employment opportunity as well as the loss of employment. It was sufficient if the plaintiff could establish that he was personally deprived of an equal employment opportunity by selection of a black candidate. Proof that another job applicant, one that was more qualified than the plaintiff, was also discriminated against and would have been selected for the job, but for the alleged discrimination, merely provides a defense with respect to types of remedies but not to the issue of liability. In this regard, the Court of Appeals stated:

> A claim of unlawful discrimination may be based upon loss of equal employment opportunity as well as loss of employment. Here, for example, plaintiff might establish that he was personally deprived of equal employment opportunity to the extent that minority job candidates were accorded preferential treatment in the selection process by virtue of the affirmative action officer's recommendation authority. Proof that another job applicant, one that was more qualified than the plaintiff and also was discriminated against, would have been selected for the job, but for the alleged discrimination merely provides a defense to certain types of remedies, such as job reinstatement or back-pay. It does not necessarily establish a lack of standing or a lack of any right of recovery whatsoever, nor does it necessarily defeat plaintiff's ability to establish a *prima facie* case of discrimination.
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> Defendant's determination to offer the position to a less-qualified candidate because of his race, not only foreclosed plaintiff's opportunity to be considered for the available job opening, it also established a precedent that did not bode well for advancement in the future. 213 Mich App at 132-133.

Consequently, the burden of proof for the purposes of avoiding summary disposition does not demand that Michael Lind demonstrate he actually would have been selected instead of the minority status candidate. Instead, it merely requires him to demonstrate that he lost an employment opportunity. In the selection of Arthur McClenney, there was only one other individual above Lind on the list, Victor Pierce. At the time of the promotion, Arthur McClenney was ranked fifth on the available list of candidates and Michael Lind was ranked second. If in fact the City reserved the right to exercise discretion in promoting off the list as it claims and given the disparity of qualifications among the candidates, there is more than sufficient evidence for a reasonable juror to conclude that the City acted with a discriminatory motive by passing over a candidate who possessed a college degree, was pursuing a legal degree, had prior supervisory experience and who possessed an outstanding employment record in favor of a candidate lacking in all of these credentials.

Hence, the fact that other white employees had been promoted from the list or could have been promoted from the list does not defeat a case of reverse discrimination. Despite the fact that Michael Lind cited and discussed the *Laitinen* decision, the Court of Appeals not only ignored it, but adopted a rationale directly opposed to it.

VI. THE COURT OF APPEALS' DECISION WAS CLEARLY ERRONEOUS IN FAILING TO RECOGNIZE FACTUAL ISSUES OVER EMPLOYER'S LEGITIMATE, NON-DISCRIMINATORY REASON

The United States Supreme Court held in *Reeves v Sanderson Plumbing Products, Inc*, 530 US 133 (2000), that an illegitimate explanation for an employment decision is in itself evidence of discrimination. Evidence that discredits an employer's legitimate non-discriminatory explanation for its action is sufficient to support a verdict of discrimination. *Id.* at 146-148. Here, there are substantial questions of fact over the validity of the City's legitimate non-discriminatory reason – maturity, and moreover, Michael Lind produced evidence demonstrating that the City's explanation was a pretext.

A. The Defendant Could Not Identify a Legitimate, Nondiscriminatory Reason for the Promotions

At his deposition, the Police Chief admitted that his decision to promote Arthur McClenney was based on a subjective determination:

> I mean, that is entirely fair, that an administrator, in trying to make a **subjective judgment** from among a group of five people, can end up maybe not even picking the right person. That can happen. I don't think it did in this case and I think that Art McClenney has turned out to be a fine supervisor for that Agency. But it can happen. (*Emphasis added).* (152a).

The only fact Thomas Pope could mention was that he was impressed with McClenney's maturity. (154a).

Courts have cautioned against accepting subjective pronouncements as justification for granting summary disposition. For example, in *Iadimarco v Runyon*, 190 F3d 151 (CA 3, 1999), an employer explained his rejection of a white male for promotion because "he did not believe the plaintiff was the right person for the job." *Id.* at 166. The *Runyon* court rejected this explanation as a legitimate, nondiscriminatory reason and as a basis for granting summary disposition. The court's rationale for this ruling underscored the fallacy of using subjective determinations to sustain summary disposition:

> However, an employer can not successfully defend a hiring decision against a Title VII challenge merely by asserting that the responsible hiring official selected the man or woman who was "the right person for the job." The problematic nature of such an explanation is most easily seen in the context of discrimination against a minority or female applicant. Such an applicant may never be the "right person for the job" in the eyes of one who feels that the job can only be filled by a White male. The biased decision maker may sincerely believe that the White male who was offered the job was the right person, and minority and female candidates who were rejected were simply wrong for the job. The mere fact that one who discriminates harbors a sincere belief that he hired the "right person" can not masquerade as a race-neutral explanation for a challenged hiring decision. Such a belief, without more, is not a race-neutral explanation at all, and allowing it to suffice to rebut a prima facie case of discriminatory animus is tantamount to a judicial repeal of the very protections Congress intended under Title VII. *Id.*

Here, the police chief's maturity explanation is a masquerade. The verity of this claim depends greatly on the police chief's credibility, which is a jury question. In fact, Michael Lind pointed to objective facts in the record which suggested that, if anything, his maturity exceeded that of Arthur McClenney. Again, Michael Lind had prior supervisory experience in a police department. Most significantly, Police Chief Pope awarded him the title of Officer of the Year in 1993, and twice in 1995 commended him in his police work. (49-53a). McClenney's file contained no similar commendations.

B. The City's Use of an Expunged Disciplinary Record is Inadmissible Evidence and a Pretext

A telltale sign that a legitimate reason is actually a pretext is when the employer alters its explanation. At oral argument on its motion for summary disposition, the City shifted its explanation of a legitimate, non-discrimination reason. The City argued for the first time that Michael Lind's two-day suspension in 1990 provided a legitimate non-discriminatory reason not to promote him in 1996 because the suspension was evidence of immaturity.

> He was disciplined as a result of that attempt [at humor] and I think that the remarks of Chief Pope are telling. In that he found the work to be chilling and offensive and it was particularly disturbing to the Chief that thing was distributed by a person who was assigned as a training officer for new officers coming into the department. If there was anything that demonstrates a lack of maturity, a lack of judgment, it was this incident [suspension]. There's nothing I think that needs to be said more. (112a).

Use of Michael Lind's disciplinary record was a pretext. It is undisputed that Michael Lind received a two-day suspension in the early 1990's in conjunction with distributing an article lampooning police work. He elected not to challenge the suspension in the grievance procedure. It also undisputed that, pursuant to the parties' Collective Bargaining Agreement (97a), Michael Lind requested to have the discipline removed from his personnel file. Police Chief Pope agreed and expunged it from his personnel file. (39a). Once the discipline is removed, there is no provision which entitles the City to later reuse the discipline. Michael Lind acted in good-faith in following the procedures under the Collective Bargaining Agreement to have this discipline removed. In contrast, the City has not acted in good-faith. Despite the fact that it had supposedly expunged his disciplinary record, the City now insists on still using it.

As far as the Plaintiff is concerned, this expunged disciplinary suspension is inadmissible evidence. The Michigan Court of Appeals addressed a similar issue in a religious discrimination case in *Rasheed v Chrysler Motors*, 196 Mich App 196; 493 NW2d (1992) *r'vd on other*

grounds, 445 Mich 109; 517 NW2d 19 (1994). In *Rasheed,* the trial court refused to allow the employer to introduce prejudicial material from the plaintiff's personnel file which was older than three years because, under the applicable collective bargaining agreement, the employer was allowed to go back only three years in making a decision to discharge. The Court of Appeals affirmed the trial court's evidentiary ruling because, according to the collective bargaining agreement, discipline older than three years was not relevant to the discharged decision. 196 Mich App at 202-302.

Here, the City made a contractual promise to remove disciplinary actions after two years. (97a). The City, through Police Chief Pope, actually did remove the suspension in question from Michael Lind's file in 1992. Yet, the City now proposes to violate its contractual promise by relying on this expunged disciplinary record to defeat his claim for discrimination. As in *Rasheed*, City's contractual violation should be repudiated, and the City should be held to its contractual promise. The City's use of the expunged disciplinary record reflects adversely on the verity of its purported legitimate non-discriminatory reason.

C. The Disciplinary Suspension Was a Pretext

Furthermore, the suspension is nothing more than a pretext. In 1996, shortly after Arthur McClenney's promotion of sergeant, the City promoted another black employee, Ray Felix, even though the City disciplined Ray Felix in 1995 for criminal misconduct in connection with domestic violence. The City suspended Ray Felix for two days for domestic violence, yet this did not prevent the City from promoting him to sergeant. (129-131a).

Moreover, neither Police Chief Pope, nor Deputy Police Chief Kruithoff mentioned the suspension as a factor in their decision against promoting the plaintiff. After Pope retired on July 1, 1996, Michael Lind, frustrated by his failure to be promoted to sergeant, requested an

explanation from Police Chief Kruithoff as to why he was being passed over for the sergeant position. Kruithoff wrote the following reply in response to Lind's inquiry:

> I received your memorandum pertaining to concerns regarding your recent promotion to the rank of Sergeant. In your memorandum, you indicate you were passed over for promotion and, as a result, have assumed you possess some deficiency that needs to be corrected. My position is that you have not been passed over for a promotion. You were one of five candidates whom I am allowed to consider for promotion. I do not rank these positions and consider them equally eligible for consideration for promotion.
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> Since I would not consider that you have been passed to promote another of the five persons eligible, I cannot logically provide you with a list of identifiable deficiencies pursuant to your request. I simply promote individuals who I feel best possess the qualities of the position being sought. This is not the same as saying that candidates not chosen have some deficiency which needs to be corrected; however, for which they were not chosen. (188a).

Therefore, when directly asked by Michael Lind, Kruithoff **did not** identify any deficiency, and obviously he never mentioned anything about a disciplinary suspension or maturity.

Furthermore, as described above, the City still continued to award Michael Lind with numerous awards in spite of this suspension. If in fact Police Chief Thomas Pope believed Michael Lind's disciplinary suspension barred his promotion, it is difficult to understand why he continued to award Michael Lind with numerous citations and commendations for excellent police work. For example, on December 6, 1993, Police Chief Thomas Pope recognized Michael Lind as Officer-of-the-Month; on July 1, 1995, Chief Pope issued a certificate of commendation to Michael Lind on April 4, 1995, in recognition of his providing police services to the Bedford Charter Township; Deputy Police Chief Kruithoff, on behalf of Thomas Pope, issued a commendation to Michael Lind for his work in connection with a drug investigation case. All of these commendations occurred after Lind's 1990 two-day suspension. (48-53a).

Thus, there are substantial questions of fact over whether the City's nondiscriminatory reason was a pretext for discrimination. The circumstances relating to the City's explanation constitute an independent basis for establishing a *prima facie* case for going forward to trial. Dissembling explanations create inferences of guilt. Rejection of an employer's explanation permits a trier of fact to infer the ultimate conclusion of intentional discrimination. *See Reeves,* 530 US at 147-148. The City's resort to using an expunged two-day disciplinary suspension and the promotion of another black employee with a worse suspension record than Lind's not only exposes the City's explanation as pretext, but also provides further background evidence of reverse discrimination.

CONCLUSION

Summary disposition was a wrong decision. The "background circumstances" standard is indefensible under the Michigan Civil Rights Act. The standard is repugnant to the concept of equal protection as guaranteed by the United States and Michigan's Constitutions.

Even assuming that "background circumstances" is a valid standard, there are substantial questions of fact which preclude summary disposition in this case. Those cases which have employed this standard have cautioned that it does not require a high burden of proof. Michael Lind more than met this standard of proof on the facts presented in this case.

Likewise, there are substantial questions of fact over the City's claimed legitimate, nondiscriminatory reason which is based entirely on a subjective pronouncement. This should not be a basis for granting summary disposition, especially when there are legitimate factual issues which convincingly demonstrate the City's professed subjective determination is only a pretext for discrimination.

For the foregoing reasons, the Appellant, Michael Lind, respectfully requests that this Court reverse the decision of the Court of Appeals and remand this case back to the trial court for trial on the merits.

Respectfully submitted,

ROBERTS, BETZ & BLOSS

Dated: May 15, 2003.

By Marshall W. Grate
Marshall W. Grate (P37728)
Attys. for Michael Lind

BUSINESS ADDRESS:

5005 Cascade Road, S.E.
Grand Rapids, MI 49546
(616) 285-8899

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